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No. 81-83

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SALONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below, in awarding petitioner retroactive promotions with backpay in this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, erred in requiring petitioner's federal government employer to promote him to the GS-8 grade level rather than to a higher grade level.

2. Whether the court of appeals properly applied the "clearly erroneous" standard of review dictated by Rule 52(a), Fed. R. Civ. P.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 645 F. 2d 875. The opinion and order of the district court (Pet. App. 24a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1981. The petition for a writ of certiorari was filed on July 9, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth on pages 3-5 of the petition.

STATEMENT

1. Petitioner, a black civilian employee of the United States Air Force at Tinker Air Force Base in Oklahoma, instituted this action in 1973 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, following final administrative denial of his claims of racial discrimination and reprisal for previously filed complaints (Pet. App. 3a). The district court, in the first trial of this case, granted summary judgment for the government on the basis of the administrative record, and the court of appeals affirmed (*id.* at 3a-4a). 511 F. 2d 902 (10th Cir. 1975). This Court, however, vacated that judgment and remanded the case for further consideration in light of *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), which held that federal employees are entitled to a trial *de novo* in the district court of suits under Title VII. 426 U.S. 917 (1976).

Following additional administrative proceedings again culminating in a denial of petitioner's claims, this case returned to the district court in 1979 for a trial *de novo* (Pet. App. 4a-5a, 32a).[1] Petitioner, who at the time had served as a GS-5 grade level supply clerk since 1967 (*id.* at 8a), contended that he would have advanced to a higher grade level in the absence of discrimination.

The district court convened a five-day hearing during which 22 witnesses testified, including several of petitioner's former and present supervisors and fellow employees. Evidence was presented which suggested that both black and

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[1]Contrary to the court of appeals' and petitioner's assertions that the government did not contest the issue of discrimination at trial (Pet. 9; Pet. App. 5a), the government did present testimony that there had been no discrimination against petitioner (see, *e.g.*, Tr. 758-760). At the conclusion of trial, however, the district court ordered the parties to prepare proposed findings of fact after stating "there has been discrimination proven here" (Tr. 786). The government's proposed findings of fact were, of course, drafted in conformity with that order.

white co-workers refer to petitioner as a troublemaker (Tr. 58-59, 74, 83, 112, 290, 339, 581-582); that petitioner had a poor attitude at work (Tr. 750-751); that he was a loner and did not participate in any employee activities by choice (Tr. 96, 521, 751); that petitioner had trouble getting along with people (Tr. 521, 551); that he argued with other employees and disrupted his work (Tr. 394); and that he became angry and unpleasant when contacted by supervisors (Tr. 364, 448-449). This evidence was contested by testimony that he had good working habits (Tr. 63-64); that he was diligent, alert and dependable (Tr. 113, 115); and that he was "a pretty excellent worker" (Tr. 290). The conflicting nature of the evidence is reflected in the district court's findings of fact, which concluded both that petitioner's "performance in his job was satisfactory" (Pet. App. 29a) and that petitioner "is known by all his co-workers, both supervisory and otherwise, as a troublemaker. He has earned this label because he has gone out of his way to create turmoil and controversy * * *" (*id.* at 27a). The district court, based on the evidence presented at trial, held that petitioner should be retroactively promoted to a GS-7 grade level effective June 28, 1970, and to GS-8 grade level effective June 28, 1972, with an appropriate award of backpay and attorneys' fees (*id.* at 39a-40a). Dissatisfied with this relief, petitioner sought to amend the judgment on the theory that he would have been advanced to higher grade levels following his court-awarded promotion in 1972 to the GS-8 position or, in the alternative, that he would have at least received step increases at the GS-8 level (*id.* at 41a-42a).[2] The district court denied petitioner's motion to amend the judgment (*id.* at 41a-43a), and petitioner appealed.

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[2]Petitioner also challenged the amount of the attorneys' fees award (Pet. App. 42a), but the attorneys' fees issue is not involved in this petition (see Pet. 11 n.2).

2. On appeal, the Tenth Circuit substantially affirmed the district court's judgment but, in effect, granted the alternative relief that had been sought in petitioner's motion to amend the judgment. Thus, the court of appeals held that petitioner was entitled to the automatic step increases that he would have received as a GS-7 from 1970 to 1972 and as a GS-8 from 1972 until he was actually upgraded pursuant to the judgment below (Pet. App. 14a-15a, 16a-17a, 22a).[3] With regard to petitioner's further contention that he should have been promoted above the GS-8 grade level, however, the court of appeals found there was a "good deal of evidence" that petitioner went "out of his way to create turmoil and controversy" (*id.* at 13a), and concluded that there was evidence in the record to support the trial court's finding that petitioner would not have advanced beyond the GS-8 position (*id.* at 15a). Because that factual finding was not clearly erroneous, the court of appeals saw no basis for setting aside the trial court's determination (*id.* at 16a).

ARGUMENT

Petitioner contends that notwithstanding his retroactive promotions and step increases he has been denied full relief. This case, however, poses no significant question of law under Title VII, presents no conflict with decisions of this Court or the courts of appeals, and does not warrant further consideration by this Court.

1. The decision of the court of appeals does not articulate any novel theory concerning the proper allocation of burdens of proof under Title VII of the Civil Rights Act of 1964 once unlawful discrimination has been established.

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[3]The court of appeals also reversed the district court's ruling on attorneys' fees and remanded the matter for further proceedings (Pet. App. 17a-23a). On remand, the district court increased the attorneys' fees award and added the automatic step increases to the amount of petitioner's backpay award. See Nos. Civ-73-591-E & Civ-78-0091-E (W.D. Okla. July 22, 1981), appeal pending, No. 81-1930 (10th Cir.).

Rather, the court below simply concluded that on the factual record before it petitioner would not have been promoted above the GS-8 grade level even in the absence of discrimination.

Title VII mandates that injured employees be restored to the positions they would have occupied but for unlawful discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-419 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 252 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979). Where a claimant asserts denial of a specified promotion and the court finds that the denial was discriminatory, the claimant is presumptively entitled to a retroactive promotion to that position, with the burden shifting to the employer to show that even absent the discrimination the plaintiff would not have been selected for the position. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 (1976); *Marotta* v. *Usery*, 629 F. 2d 615, 617-618 (9th Cir. 1980); *Richerson* v. *Jones*, 551 F. 2d 918, 924-925 (3d Cir. 1977); *Day* v. *Mathews*, 530 F. 2d 1083, 1085 (D.C. Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F. 2d 437, 444 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F. 2d at 259-260.

In this case both the district and appellate courts concluded that petitioner had been discriminatorily denied a promotion to a GS-7 grade level position in 1970 and a GS-8 grade level position in 1972. Petitioner was properly awarded retroactive promotions with backpay to compensate for those specific instances of discrimination. Petitioner, however, contends that once discrimination has been established, he is entitled to hypothetical promotions beyond the ones serving as the foundation for his Title VII action (Pet. 26-27). Whatever the merits of this contention in the abstract, it is clear that on this record petitioner is not

entitled to additional relief based on speculative promotions along a hypothetical career ladder. The district court, in a finding sustained by the court of appeals, specifically concluded that petitioner would not have received any further promotion beyond the GS-8 grade level even absent discrimination.[4]

Petitioner attempts to convert this purely factual holding into a question of law by arguing that the courts below improperly imposed on him the burden of proof regarding subsequent promotions. Neither court below specifically addressed the burden of proof issue. It is clear, nonetheless, that, contrary to petitioner's assertions (Pet. 36-39), substantial evidence supports the district court's conclusion that petitioner would not have been promoted beyond the GS-8 grade level even absent discrimination. During a five-day hearing the district court heard evidence that petitioner had trouble getting along with people (Tr. 521, 551), argued with other employees and disrupted his work (Tr. 394), became angry and unpleasant when contacted by supervisors (Tr. 364, 448-449), had an overall poor attitude at work (Tr. 750-751), was commonly referred to as a troublemaker (Tr. 58-59, 74, 83, 112, 290, 339, 581-582), and was a loner who did not participate by choice in any employee activities (Tr. 96, 521, 751). These factors combine to support the district court's holding that petitioner would not have been promoted above the GS-8 grade level even in the absence of

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[4]The district court concluded (Pet. App. 42a):

> The court finds that plaintiff would not have received any promotions or step increases after June 28, 1972, because he was a trouble maker and spent a great deal of his time agitating other employees against management and became so preoccupied with his efforts to disrupt the procedure at Tinker that his job performance was unsatisfactory, and his denial of advancement after said date was because of these factors and not because of his race.

discrimination (Pet. App. 27a-31a, 42a).[5] The court of appeals concluded that this factual determination was not clearly erroneous (*id.* at 16a), and this factual issue presents no question warranting review by this Court.

2. Petitioner further contends that the court of appeals erred in its application of the "clearly erroneous" standard of review by deferring to the trial court's factual determination that petitioner would not have advanced beyond the GS-8 level. Although petitioner urges this Court to review this case in order to elaborate on Rule 52(a), Fed. R. Civ. P., no such elaboration is warranted on the present record.

This Court has repeatedly observed that the courts of appeals, in reviewing backpay determinations under Title VII, must recognize "that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 421-422. See also *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 780. Moreover, this Court has held that the standard of appellate review in such cases "will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 424-425, quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931). And it is well established that the reviewing court should not set aside the trial court's factual findings as clearly erroneous unless a careful review of the record leaves the court with a definite

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[5]Petitioner intimates (Pet. 17) that there is no record evidence of his conduct after 1972 to support the district court's conclusion that he would not have advanced beyond a GS-8 grade level. This contention overlooks the fact that one of petitioner's current supervisors testified that petitioner was presently regarded by his fellow employees as being "aloof" and having "lots of problems" (Tr. 521).

and firm conviction that a mistake has been made. See, *e.g.*, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Under these principles, the court of appeals properly declined to set aside the trial court's factual determination concerning petitioner's proper grade level.[6] The fact that the court of appeals set aside the district court's similar finding that petitioner would not have received step increases (see pages 3-4, *supra*) shows that the appellate court independently evaluated the evidence and did not unduly defer to the trial court's determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]This case is not at all like *Swint* v. *Pullman-Standard*, 624 F. 2d 525 (5th Cir. 1980), cert. granted, Nos. 80-1190 & 80-1193 (Apr. 20, 1981), in which the court of appeals chose to set aside the trial court's factual findings.

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